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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 351

McKINLEY DURHAM, LUCIOUS PATTERSON, SR.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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McKinley Durham, and Lucious Patterson, Sr., respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court for the Fifth Circuit, entered in the above styled case on June 17, 1969, affirming the petitioners' convictions.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit in this case is attached hereto as appendix "A".

JURISDICTION

The judgment of the Circuit Court for the Fifth Circuit was entered on June 17, 1969

The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Section 2101 (f).

QUESTIONS PRESENTED

I

Whether Appellants were denied their rights to a speedy trial in violation of the Constitution of the United States.

II

Whether the federal officers used unlawful entrapment to effect and sustain prosecution of Lucious Patterson, Sr., and McKinley Durham.

STATEMENT OF THE FACTS

Robert E. Griffith of the Alcohol and Tobacco Divisions, of the U. S. Treasury Department in October, 1966 (R. 28), employed an informer Joe Hayes, Jr., at ten (10) dollars per day and a reward at the end of the investigation (R. 37) to help them catch two suspected violators that they were "not able to get off the ground on", in investigating (R. 37).

The two such persons were the Appellants: Griffith directed the informer to get information on them (R. 48); he "pointed him in that direction, asked him (Hayes) if he could approach them about buying whiskey" (R. 48).

With the informer in contact and the officers hiding in the trunk of the automobile, observing the entire transaction through a rear light which had been removed, three purchases were made (R. 1, 3, 5).

On January 17, 1967 (R. 47), some 47 days after the first purchase and sale appellants were arrested and charged with violations of 26 U.S.C.A. 5205 (a) (2), 5604 (a).

Appellants were indicted on July 25, 1967, Two hundred and five (205) days after their arrest.

On October 26, 1967, ninety (90) days later Appellants' motion to dismiss the indictment (R. 6) based on the Sixth Amendment for lack of prosecution, the trial judge overruled and denied Appellants' motion. On October 16, 1968, 365 days after the motion was made (R. 9); on October 26, 1967 (R. 9), Appellants filed a Demand for Trial, stating that appellants had been under arrest since January, 1967, ten months without trial. The Court granted this motion on October 16, 1968, a year after the Motion was made and set trial for October 21, 1968, at which time Appellants were tried and convicted.

REASON FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals in its opinion of June 17, 1969, held that petitioners failed to show substantial prejudice to their defense thus depriving themselves of the benefit of the constitutional relief provided by the Sixth Amendment to the Constitution of the United States.

Petitioners, however, submit that a showing of prejudice was well documented by citational reference to *U. S. v. McWilliams,* 163 F. 2d 695, which stated and set out the

attending prejudices inherent in failure to grant a speedy trial to a defendant. Petitioners further alleged that long delay in case being brought to trial, assumption that unreasonable delays were by their nature prejudicial may be considered along with other circumstances. *Dockery* v. *U. S.*, 393 F. 2d 352. Likewise in *Hedgepeth* v. *United States*, 365 F. 2d 952 (1966), the Court stated emphatically that unreasonable delays are by their nature prejudicial.

Defendants were sorely oppressed by the long delay and such delays are prohibited by the Sixth Amendment. *United States* v. *Ewell*, 383 U. S. 116.

The Court erroneously computed the relevant time period at which the right to a speedy trial existed in this case based upon the surrounding facts and circumstances. In *Smith* v. *U. S.*, 79 S. Ct. 991, 360 U. S. 1, 3 L. Ed. 2d 1041 (1959), the Court declared that "if, contrary to sound judicial administration in our federal system *arrest* and *incarceration*, are followed by inordinate delay prior to indictment a defendant may under appropriate circumstances invoke the protection of the Sixth Amendment". The Court then should have considered the entire period from defendants' arrest up to trial of the defendants. In *Lucas* v. *U. S.*, 363 F. 2d 500, the Court espoused the rule that the right to a speedy trial attaches from the time charges are formally lodged reason of a Complaint, information, or indictment.

In *Williamson* v. *United States*, 311 F. 2d 441 (1962), the Court prohibited specificity in efforts to arrest and convict specific suspects, stating that this results in entrapment in the instant case the record shows that defendants were sought out and coerced into making a sale, when no previous inclination to do the same was in the minds of the defendants. The purpose to entrap and arrest germinated

in the minds of the officers before the defendants were ever put under surveillance. The record shows that a specific request was made to try and get Patterson and Durham. Based on such facts and evidence fundamental fairness was denied these defendants.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

B. CLARENCE MAYFIELD
Attorney for Petitioners

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CERTIFICATE OF SERVICE

I, B. CLARENCE MAYFIELD, hereby certify that I have served a copy of the within and foregoing Petition for a Writ of Certiorari for Petitioners upon Mr. Floyd M. Buford, United States Attorney, Middle District of Georgia, Post Office Box U, Macon, Georgia 31303, by mailing a copy of the same to him by United States Mail, postage prepaid, addressed as indicated above.

This 16th day of July, 1969.

B. CLARENCE MAYFIELD
Attorney for Petitioners

910 West Broad Street
Savannah, Georgia 31401

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27163

SUMMARY CALENDAR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

McKINLEY DURHAM and LUCIOUS PATTERSON, SR.,
Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Georgia

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June 17, 1969

Before BROWN, Chief Judge, THORNBERRY and MORGAN, Circuit Judges.

PER CURIAM: Appellants were convicted by a jury of selling moonshine whiskey in violation of 26 U.S.C., §§ 5205 (a) (2), 5604 (a). The record indicates that they were convicted on the basis of the testimony of an informer who made the purchases. On appeal from their con-

viction they allege two errors of constitutional proportions, but we find no basis for reversal.[1]

First, it was contended that appellants were denied their sixth-amendment right to a speedy trial by the inordinate delay between the time of the alleged offense and the time of trial. We note at the outset that under our decisions the relevant period of time is that between the indictment, or institution of prosecution and the trial. *Harlow* v. *United States*, 5th Cir. 1962, 301 F.2d 361. Here there was a lapse of fifteen months between indictment and trial, nine of which were devoted to a search by the Government for its key witness, the informer. As most of the delay was occasioned by the disappearance of the key witness, there is no question of any dilatory action on the part of the Government. Moreover, appellants have not shown why the delay resulted in substantial prejudice to their defense. In the absence of a showing of prejudice, the contention that they were denied a speedy trial must fall. *Oden* v. *United States*, 5th Cir. 1969, ... F.2d ..... [No. 26216, April 22, 1969]; *United States* v. *Collier*, 7th Cir. 1966, 362 F.2d 135, 139.

Secondly, it is urged that appellants were denied due process by the Government's use of a paid informer. The record indicates that the informer was retained to investigate numerous suspects and that in the end he informed on twenty-two liquor law violators. He was paid $10 per day subsistence and was given a $400 reward for all his work at the end of his employment. There was no evi-

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1. Pursuant to new Rule 18 of the Rules of this Court we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the Clerk to place the case on the Summary Calendar and to notify the parties in writing. *See Murphy* v. *Houma Well Service*, 5th Cir. 1969, ... F.2d ....., Part I [No. 26,902, slip opinion dated March 11, 1969].

dence of a contingent fee arrangement between him and the federal agents whereby he would be paid a specified sum to convict a specific suspect. Thus, the method of payment was not the kind condemned by this Court in *Williamson* v. *United States*, 5th Cir. 1962, 311 F.2d 441. *See Henley* v. *United States*, 5th Cir. 1969, 406 F.2d 705.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 351

MCKINLEY DURHAM AND LUCIOUS PATTERSON, SR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1969. The petition for a writ of certiorari was filed on July 17, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly denied petitioners' motion to dismiss for lack of speedy trial.

2. Whether the financial arrangement between the government and the informer resulted in entrapment so as to require reversal of petitioners' convictions.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of possessing and selling non-tax-paid liquor, in violation of 26 U.S.C. 5205(a) and 5604 (a). On November 1, 1968, Durham was sentenced to imprisonment for six concurrent terms of one year and a day; Patterson, for two concurrent terms of eighteen months. On appeal, the court of appeals affirmed *per curiam*.

The evidence showed that in October 1966, Alcohol and Tobacco Tax Division agent Robert Griffith enlisted Joe B. Hayes to serve as an informer on federal liquor law violators in the area of Macon, Georgia (R. 48, 58).[1] Griffith agreed to pay Hayes $10 per day for expenses, and a bonus at the end of his employment if his efforts were successful overall (R. 24, 63). The informer was specifically directed not to entice individuals into selling him liquor or to offer to pay more than the going rate (R. 49). Griffith urged Hayes to attempt to make a purchase from

[1] "R." refers to the "Transcript of Record" on file with the Clerk of this Court.

petitioner Patterson, an acquaintance of Hayes. The agent had reason to believe that Patterson was "the biggest bootlegger down there" (R. 72).

On November 29, 1966, Hayes met Patterson at the latter's gasoline station and offered to purchase forty gallons of whiskey. Patterson agreed to make the sale and told Hayes that the transaction would take place at an old saw mill (R. 17-18). Prior to the designated time for the purchase, agent Griffith removed the back-up light lens from Hayes' car in order to enable him to observe the transaction while hiding in the trunk (R. 49). That evening Hayes, with Griffith secreted in the trunk, drove Patterson to the saw mill. There they met co-petitioner Durham, who had driven a pick-up truck containing the illicit liquor (R. 18, 49-50). Hayes paid Patterson $200 in funds furnished by the agent, and received eight five-gallon jugs containing moonshine whiskey on which the prescribed taxes had not been paid (R. 18, 51-52). Patterson told Hayes to return the empty jugs (R. 23). Additional 20-gallon purchases were made on December 8 and 15, 1966, each time observed by an agent located in the trunk of the car driven by Hayes (R. 19-21, 52-54). At the end of his employment, which involved informing on more than twenty violators, Hayes received a bonus of $400 (R. 25, 74).

ARGUMENT

1. The courts below correctly held that petitioners were not entitled to a dismissal of their case for lack of a speedy trial. They were arrested on January 17,

1967 (R. 71), and indicted on July 25, 1967. Trial occurred on October 21, 1968. Most of the pre-trial delay was occasioned by the disappearance of the informer, Hayes, for a period of nine months. When located in Centre, Alabama, Hayes was immediately returned to the Middle District of Georgia. There was no question of any dilatory action by the government. See *Pollard* v. *United States*, 352 U.S. 354, 361. Nor did petitioners suffer any prejudice from the delay.[2] They were not incarcerated during this time, and they made no showing whatever that evidence had disappeared or witnesses had become unavailable. In light of these circumstances, petitioners' speedy trial claim is without merit. *United States* v. *Ewell*, 383 U.S. 116, 120-123; *Smith* v. *United States*, 360 U.S. 1, 10; *Beavers* v. *Haubert*, 198 U.S. 77, 87; see also *Harrison* v. *United States*, 392 U.S. 219, 221, n. 4; *Hedgepeth* v. *United States*, 365 F. 2d 952, 954 (C.A.D.C.).

2. The evidence failed to establish unlawful entrapment, in view of the clear showing that petitioners demonstrated no reluctance whatsoever to sell illicit liquor to the informer. Petitioners urge this Court to strike down their convictions because of the terms of the financial arrangement between the informer and the government agents. In support of their position they cite *Williamson* v. *United States*, 311 F. 2d 441 (C.A. 5), where the court of appeals

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[2] In their pretrial motion to dismiss the indictment, petitioners' only reference to prejudice was a claim that they had been kept from "various endeavors" for "no less than eight days." (R. 6).

reversed a conviction because payments of specific sums of money were promised to an informer if he would "catch" two particular suspects. The Fifth Circuit and other courts of appeals as well have distinguished *Williamson* and upheld convictions where the informant is paid, not a specific sum for the conviction of a specific individual, but a per diem amount and an unspecified bonus depending upon the success of his entire efforts (all of which is paid before any convictions). *Henley* v. *United States*, 406 F. 2d 705 (C.A. 5); *Harris* v. *United States*, 400 F. 2d 264 (C.A. 5); *Moore* v. *United States*, 399 F. 2d 318 (C.A. 5), certiorari denied, 393 U.S. 1098; *Bullock* v. *United States*, 383 F. 2d 545 (C.A. 5); *United States* v. *Costner*, 369 F. 2d 959, 973 (C.A. 6), *United States* v. *Baxter*, 342 F. 2d 773 (C.A. 6), certiorari denied, 381 U.S. 934; *Maestas* v. *United States*, 341 F. 2d 493 (C.A. 10); *United States* v. *Crim*, 340 F. 2d 989 (C.A. 4). There is thus no occasion for further review of this issue.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
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WILL WILSON,
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BEATRICE ROSENBERG,
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Attorneys.

AUGUST 1969.

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